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UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:

DESERT OASIS APARTMENTS, LLC,

Debtor.

Case No: BK-S-18-12456-GS
 Chapter 11

Date: March 11, 2021
 Time: 1:30 p.m.
 Place: Telephonic, GS Courtroom

**OBJECTION AND RESERVATION OF RIGHTS OF THE U.S. TRUSTEE TO CHAPTER 11 TRUSTEE
KAVITA GUPTA'S JOINT PLAN OF LIQUIDATION**

To the Honorable Gary Spraker, United States Bankruptcy Judge:

Tracy Hope Davis, the United States Trustee for Region 17 ("U.S. Trustee"), by and through her undersigned counsel, hereby files her objection (the "Objection") and reserves her rights to object to confirmation of *Chapter 11 Trustee Kavita Gupta's Joint Plan of Liquidation* [DOA Case, ECF No. 239; DOI Case, ECF No. 116] (the "Plan") filed by Desert Oasis Apartments, LLC ("DOA") and Desert Oasis Investments, LLC ("DOI") (collectively, "Debtors").¹

¹ Unless otherwise noted: "Section" refers to a section of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (as amended, the "Bankruptcy Code"); "FRBP" refers to the Federal Rules of Bankruptcy Procedure; "FRE" refers to the Federal Rules of Evidence; and, "DOA Case, ECF No." refers to documents filed in *In re Desert Oasis Apartments, LLC*, Case No. 20-12456 (the "DOA Case") and, "DOI Case, ECF No." refers to documents filed in *In re Desert Oasis Investments, LLC*, Case No. 20-124576 (the "DOI Case"). The U.S. Trustee requests that the Court take judicial notice of the pleadings and documents filed in these cases, pursuant to FRBP 9017 and FRE 201. To the extent that the objection contains factual assertions predicated upon statements made by Chapter 11 Trustee Kavita Gupta, or her agents, attorneys, professionals, officers, directors or employees, the U.S. Trustee submits that such factual assertions are supported by admissible evidence in the form of admissions of a party opponent under FRBP 9017 and FRE 801(d)(2).

INTRODUCTION

The Court should sustain the objection of the United States Trustee to confirmation of the Plan for several reasons. First, the Plan is a liquidating plan which contains a *de facto* discharge provision that is not permissible pursuant to Section 1141(d)(3) of the Bankruptcy Code. Second, the Plan's treatment of the Desert Land claim violates Sections 507, 1122 and 1129(a)(1) of the Bankruptcy Code. The Plan also improperly classifies the statutory claim of the United States Trustee in contravention of 28 U.S.C. § 1930(a)(6). In view of the aforementioned objections to the Plan, fails to meet the requirements of section 1129 of the Bankruptcy Code and the Court should deny confirmation.

To the extent that the Joint Plan is amended or supplemented, the U.S. Trustee reserves all her rights with respect to this matter, including, but not limited to her right to take any appropriate action under the Bankruptcy Code, the FRBP, and the local rules of the U.S. Bankruptcy Court.

The Objection is supported by the following memorandum of points and authorities and any argument the Court may permit on the Objection.

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND FACTS

1. On March 30, 2018, four involuntary Chapter 7 petitions were filed against alleged debtor Desert Land, LLC ("Desert Land")², DOA, DOI, and SkyVue Las Vegas, LLC ("SkyVue").³

2. Desert Land, DOA and DOI owned approximately 38.5 acres of real property on the south end of the Las Vegas Strip. [See DOA, ECF No. 243, p. 16 of 44]. SkyVue owns 99.5% of Desert Land and DOA. Desert Owns 100% of DOI. [See Desert Land, ECF No. 30, p 1 of 3].

3. On June 28, 2018, Desert Land was converted to a voluntary Chapter 11 case. [See Desert Land Case, ECF No. 79]. On June 29, 2018, DOA, DOI, and SkyVue were

² See *In re Desert Land, LLC*, Case No. 18-12454-GS (Bankr. D. Nevada) (the "Desert Land Case").

³ See *In re SkyVue Las Vegas, LLC*, Case No. 18-12458-GS (Bankr. D. Nevada) (the "SkyVue Case").

1 converted to voluntary Chapter 11 cases. [See DOA Case, ECF No. 65; DOI Case, ECF No. 48;
2 and SkyVue Case, ECF No. 51]. On July 6, 2018, the Court order that the four cases be jointly
3 administered. [See Desert Land Case, ECF No. 90; DOA Case, ECF No. 89; DOI Case, ECF
4 No. 61; and, SkyVue Case, ECF No. 58].

5 4. The Section 341 meeting in the four cases were held and concluded on August 27,
6 2018. [See Desert Land Case, ECF Nos. 126, 195; DOA Case, ECF No. 103; DOI Case, ECF
7 No. 49, 71; and, SkyVue Case, ECF No. 67].

8 5. No official committee of unsecured creditors was appointed in any of the four
9 cases. [See generally case docket Desert Land Case, DOA Case, DOI Case, and SkyVue Case].

10 6. On March 21, 2019, the Court entered an order directing the appointment of a
11 Chapter 11 or Chapter 11 trustees for the four estates. [See Desert Land Case, ECF No. 519].

12 7. On March 27, 2019, the U.S. Trustee appointed Kavita Gupta (“Trustee Gupta”)
13 as the Chapter 11 Trustee for the Desert Land, DOA and DOI estates. [See Desert Land Case,
14 ECF No. 522]. On April 2, 2019, the Court approved the appointment of Trustee Gupta. [See
15 Desert Land Case, ECF No. 528].

16 8. On March 27, 2019, the U.S. Trustee appointed Brian Shapiro (“Trustee
17 Shapiro”) as the Chapter 11 Trustee for the SkyVue estate. [See Desert Land Case, ECF No.
18 523]. On April 2, 2019, the Court approved the appointment of Trustee Shapiro. [See Desert
19 Land Case, ECF No. 529]. On August 21, 2020, the Court converted the SkyVue Case to
20 Chapter 7. [See SkyVue Case, ECF No. 176].

21 9. On June 15, 2020, the U.S. Trustee appointed Jeffrey I. Golden as the Chapter 11
22 Trustee for the Desert Land Case, due to the resignation of Trustee Gupta. [See Desert Land
23 Case, ECF No. 1265]. On June 18, 2020, the Court approved the appointment of Trustee
24 Golden. [See Desert Land Case, ECF No. 1281].

25 10. On August 17, 2020, the Court entered an order terminating joint administration.
26 [See Desert Land Case, ECF No. 1439].
27
28

11. On July 26, 2020, the Court entered an order approving the sale of Desert Land's real estate through a \$75 million credit bid to the Shotgun Creek creditors. [See Desert Land Case, ECF No. 1395].

12. On June 15, 2020, the Court approved the sale of DOA's real estate to ED-DEN Investment Co. LLC for \$15,600,000.00. [See DOA Case, ECF No. 108].

13. On June 22, 2020, the Court approved the sale of DOI's real estate to The Three Affiliated Tribes of the Fort Berthold Indian Reservation for \$12,000,000.00. [See Desert Land Case, ECF No. 1293].

14. DOA's and DOI's Plan was filed on January 26, 2021. [See DOA Case, ECF No. 239; DOI Case, ECF No. 116]. Their Joint Disclosure Statement was filed on January 28, 2021. [See DOA Case, ECF No. 243; DOI Case, ECF No. 120]. On January 28, 2021, the Court entered an order conditionally approving the Disclosure Statement and setting a combined hearing on final approval of the Disclosure Statement and Confirmation of the Plan for March 11, 2021, with objections due by February 25, 2021. [See DOA Case, ECF No. 244; DOI Case, ECF No. 121].

15. The Plan is styled as a Plan of Liquidation. [See DOA Case, ECF No. 239; DOI Case, ECF No. 116].

16. Notwithstanding the Debtors' position that this is a liquidating plan, the Plan contains provisions that extinguish claims, except for what is provide through the Plan:

8.1 Upon Entry of the Confirmation Order, all debts of DOA and DOI will be deemed fixed and adjusted pursuant to the Plan and DOA and DOI will have no further liability on account of claims or interests except as set forth in the Plan. All payments and all distributions made by the Disbursing Agent under the Plan will be in full and final satisfaction, settlement and release of all Claims; provided, however, that nothing contained in the Plan will be deemed to constitute or result in a discharge of the Debtors under Section 1141(d)(3).

8.2 Upon entry of the Confirmation Order, the provisions of the Plan shall be binding upon DOA and DOI, any person or entity acquiring property under the Plan, and any creditor or interest holder, whether or not the claim or interest of such creditor or

1 interest holder is impaired under the Plan and whether or not such
2 creditor or interest holder has accepted the Plan.

3 [See DOA Case, ECF No. 239, DOI Case, ECF No. 116, each at pp. 22-23; Plan §§ 8.1-8.2].

4 17. In addition, the Plan provides for an injunction of indeterminant length preventing
5 creditors from taking action against the Debtors except to enforce the Plan:

6 6.1 Vesting of Property/Continuation of Estates. Notwithstanding
7 Section 1141(b), no property of DOA or DOI and/or the Estates
8 shall re-vest in DOA or DOI as of the Effective Date. The estates
9 created by operation of Section 541(a) shall continue, and all assets
10 of DOA and DOI and/or their respective Estates shall be deemed to
11 be property of their respective bankruptcy estates until distributed
12 in accordance with this Plan. The provisions of Section 362(a)
13 shall continue in full force and effect following entry of the
Confirmation Order, and stay any person from taking any act,
commencing any suit, or enforcing any right, which has the effect
of asserting, liquidating, or enforcing any claim against any
property of the Estates that arose prior to entry of the Confirmation
Order. The sole recourse of a creditor holding a claim that arose
prior to entry of the Confirmation Order shall be an action in the
Bankruptcy Court seeking to enforce its rights under this Plan.

14 [See DOA Case, ECF No. 239, DOI Case, ECF No. 116, each at pp. 16-17; Plan § 6.1].

15 18. The Plan defines administrative claims to includes fees payable pursuant to 28
16 U.S.C. § 1930, sets an administrative bar date that is 45 days after entry of an order confirming
17 plan, and defines administrative claims as subject to an allowance process. [See DOA Case, ECF
18 No. 239, DOI Case, ECF No. 116, each at pp. 3-4; Plan §§ 1.2—1.5].

19 19. The Plan provides for payments of U.S. Trustee fees:

20 3.3 U.S. Trustee Fees: The Disbursing Agent shall pay in cash in
21 full on the Effective Date any statutory fees under 28 U.S.C.
22 §1930(a)(6) then owing and unpaid to the U.S. Trustee. After the
23 Effective Date, the Disbursing Agent shall pay a quarterly fee to
24 the U.S. Trustee, for deposit into the U.S. Treasury, for each
quarter (including any fraction thereof) until the Chapter 11 Cases
are converted, dismissed, or closed by entry of a final decree,
pursuant to 28 U.S.C. §1930(a)(6). The U.S. Trustee Fees incurred
25 by the DOA Estate shall be paid solely from assets of the DOA
26 Estate, and U.S. Trustee Fees incurred by the DOI Estate shall be
paid solely from assets of the DOI Estate.

27 [See DOA Case, ECF No. 239, DOI Case, ECF No. 116, each at pp. 9-10; Plan § 3.3].

28 20. The Plan contains six classes: (1) Class 1 is the secured claim of Northern Trust
against DOA; (2) Class 2 is the Gonzales Trust claim against DOA; (3) Class 3 is a claim by the

1 Gonzales Trust against DOI; (4) Class 4 is an unsecured claim by Juniper Loan Servicing, Inc.
 2 against DOI; (5) Class 5 is an unsecured claim by Desert Land against DOA; and, (6) Class 6 are
 3 membership interests in DOA and DOI. [See DOA Case, ECF No. 239, DOI Case, ECF No.
 4 116, each at pp. 8-9; Plan §§ 2.1—2.6].

5 21. DOA originally scheduled Desert Land with an unsecured claim for \$4.5 million,
 6 which was not scheduled as disputed, unliquidated or contingent. [See Desert Land Case, ECF
 7 No. 104, p. 19 of 54; #3.6]. On April 23, 2020, DOA amended its schedules to remove this
 8 claim. [See Desert Land Case, ECF No. 1080, pp. 7-8 of 10]. The original deadline to file proofs
 9 of claim was November 20, 2018. [See Desert Land Case, ECF No. 126]. Trustee Golden filed
 10 a proof of claim, as amended, for Desert Land against DOA on September 23, 2020. [See DOA,
 11 Claims Register, POC No. 3]. Trustee Golden asserts that this proof of claim is timely filed
 12 pursuant to a tolling agreement negotiated between him and Trustee Gupta. [See Desert Land
 13 Case, ECF No. 250, p. 11 of 23; ECF No. 251, pp. 2-3 of 154; ¶5].

14 22. The Plan designates Kavita Gupta as the disbursing agent at a rate of \$550 an
 15 hour. [See DOA Case, ECF No. 239, DOI Case, ECF No. 116, each at pp. 6 (Plan § 1.20) and 19
 16 (Plan § 6.10)].

17 ARGUMENT

18 23. Section 1129(a) of the Bankruptcy Code sets forth a series of requirements that a
 19 plan proponent must meet in order to obtain confirmation of a plan of reorganization. First
 20 among these is section 1129(a) (1), which requires the plan to comply with the applicable
 21 provisions of the Bankruptcy Code. In addition, Section 1129(a) (2) requires a plan proponent to
 22 comply with the requirements of the Bankruptcy Code.

23 24. Before the Court can confirm a plan filed under Chapter 11, the Court must find
 24 that the plan and the plan's proponent have complied with the requirements of Section 1129(a),
 25 and, if not all impaired classes have voted to accept the plan, that the Plan meets the requires of
 26 Section 1129(b). See 11 U.S.C. § 1129.

The Plan appears to grant DOA and DOI de facto discharges

25. Both the Plan and Disclosure Statement make clear that the Joint Plan is a plan of liquidation. [See DOA Case, ECF Nos. 239 and 243, DOI Case, ECF Nos. 116 and 120].

26. The Plan specifies that the Debtors shall not receive a bankruptcy Discharge. [See DOA Case, ECF No. 239, DOI Case, ECF No. 116, each at p. 22; Plan § 8.1].

27. Debtors have sold all their assets. [See DOA Case, ECF No. 108, Desert Land Case, ECF No. 1293].

28. The Debtors are both listed as a “Corporation (including Limited Liability Company (LLC) and Limited Liability Partnership (LLP))” on their voluntary petitions and their names indicates that they are limited liability companies. [See Desert Land Case, ECF No. 104, p. 2 of 54; item #6; ECF No. 105, p. 2 of 33; item #6]. As corporate debtors, DOA and DOI would not be entitled to Chapter 7 discharges. See 11 U.S.C. §§ 101(9)(A) and 727(a)(1).

29. Section 1141(d)(3) provides that:

The confirmation of a plan does not discharge a debtor if—

(A) the plan provides for the liquidation of all or substantially all of the property of the estate;

(B) the debtor does not engage in business after consummation of the plan; and

(C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

See 11 U.S.C. § 1141(d)(3).

30. “Under § 1141(d)(3), a corporate or partnership debtor that is both liquidating and discontinuing its business does not receive a discharge when its plan is confirmed.” *Teamsters Pension Trust Fund v. Malone Realty Co.*, 82 B.R. 346, 349 (E.D. Pa. 1988), citing *In re Novelty & Toy Co., Inc.*, 22 B.R. 77 (Bankr. Ala. 1982); 5 Collier on Bankruptcy, para. 1141.01[4][a] (15th ed. 1987).

31. Because the Debtors are not entitled to a discharge through this Plan, injunctions that prevent the post-confirmation prosecution of claims against the Debtors operate as a

1 discharge and are therefore inappropriate. *See In re Bigler LP*, 442 B.R. 537, 545-46 (Bankr.
2 S.D. Tex. November 24, 2010).

3 32. The Ninth Circuit of Appeals has held that “[a] discharge under section 524(a)(2)
4 does not void *ab initio* a liability. Rather, section 524 constructs a legal bar to its recovery. A
5 discharge is in effect a special type of permanent injunction.” *In re American Hardwoods*, 885
6 F.2d 621, 626 (9th Cir. 1989).

7 33. The Ninth Circuit reads 11 U.S.C. § 524(e) to limit the Bankruptcy Court's
8 authority to enter injunctions under the Bankruptcy Code's more general source of equitable
9 power set forth in Section 105(a) of the Bankruptcy Code. *See Resorts Int'l, Inc. v.*
10 *Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394, 1402 (9th Cir. 1995) (“Noting that section 105
11 does not authorize relief inconsistent with more specific law, we concluded the specific
12 provisions of section 524 displace the court's equitable powers under section 105 to order
13 permanent relief [against a non-debtor] sought by [the debtor].”).

14 34. Accordingly, the provisions in the Plan that extinguish claims, except for what
15 creditors will receive under the Plan, and continue the stay indefinitely appear to grant DOA and
16 DOI a *de facto* discharge in contravention of the Code. Therefore, the *de facto* discharge in Plan
17 §§ 8.1 and 8.2 should be stricken.

18 35. The U.S. Trustee objects to any permanent injunction in the Plan and objects to
19 the injunction provided for in Plan § 6.1 to the extent that it applies any longer than is necessary
20 to complete the payments provided for under the Plan. [*See* DOA Case, ECF No. 239, DOI
21 Case, ECF No. 116, each at pp. 16-17; Plan § 6.1].

22 36. Because the Plan does not comply with Section 1141(d)(3), it fails to meet the
23 requirements for confirmation under Section 1129(a)(1) and confirmation should be denied.

24 *The Plan defines Quarterly Fees as administrative claims, which require allowance*

25 37. The U.S. Trustee objects to the Plan to the extent it seeks to subject quarterly fees
26 to an allowance procedure by grouping such fees into the definition of “Administrative Claim” as
27 set forth in the Plan.
28

38. Fees assessed pursuant to 28 U.S.C. § 1930(a)(6) are not synonymous with administrative expenses allowed pursuant to 11 U.S.C. § 503(b). “Quarterly fees payable to the U.S. Trustee are assessed against Chapter 11 estates pursuant to § 1930(a)(6) of Chapter 123 of Title 28.” *U.S. Trustee v. Hirsch (In re Ehrman)*, 184 B.R. 362, 363-64 (D. Ariz. July 3, 1995)(emphasis added). *See also U.S. Trustee v. Endy (In re Endy)*, 104 F.3d 1154, 1157 (9th Cir. 1997)(holding that quarterly fees had a higher priority than Chapter 11 administrative expenses in the case of a conversion to Chapter 7); *Huisinga v. Carter (In re Juhl Enters.)*, 921 F.2d 800, 803 (8th Cir. 1990)(“Nothing in the statutes indicates that the Trustee's quarterly fees are synonymous with § 503(b) administrative expenses.”).

39. Therefore, if the Plan is confirmed, the confirmation order should make clear that quarterly fees are assessed fees that do not require allowance and will be paid for periods when these cases remain open, in Chapter 11, and have not been converted or dismissed. In addition, the confirmation order should provide that the Debtors will continue to file periodic reports until these cases are closed.

The Desert Land Claim should be treated as an allowed claim until the Court sustained an objection to it

40. A claim, proof of which is filed under Section 501, is deemed allowed unless a party in interest objects. *See* 11 U.S.C. § 502(a). A proof of claim in Chapter 11 is deemed filed if it appears in the schedules filed under Section 521(a)(1) and is not scheduled as disputed, contingent or unliquidated. *See* 11 U.S.C. § 1111(a). Holders of allowed claims under Section 502 may accept or reject a plan. *See* 11 U.S.C. § 1126(a).

41. Until well after the deadline to file proofs of claim, DOA’s schedules listed a claim held by Desert Land for \$4.5 million, which was not scheduled as disputed, unliquidated or contingent. Trustee Golden filed a proof of claim, purportedly within the time set by a tolling agreement.

42. The Disclosure Statement provides that Trustee Gupta suspended her objection to the Desert Land Claim because the Court orally ruled that the Desert Land Case should be

1 dismissed. [See DOA Case, ECF No. 243, p. 23 of 44].⁴ Therefore, Class 5 should be deemed
2 allowed, unless and until the Court sustains any objection brought against it.

3 43. To the extent that the Plan seeks to bar creditors in Class 5 from accepting or
4 rejecting the Plan pursuant to Section 1126(a) without having objected to Class 5 claim under
5 Section 502(a) then the Plan fails to comply with Section 1129, and confirmation should be
6 denied.

7 44. The U.S. Trustee reserves all rights to object to any amendments or supplements
8 to the Plan.

9 **WHEREFORE**, the U.S. Trustee respectfully requests that the Court deny confirmation
10 of the Plan unless the Debtors make changes to the Plan to address the issues set forth above.

11 Dated: February 25, 2021

12 **TRACY HOPE DAVIS**
13 **UNITED STATES TRUSTEE, REGION 17**

14 By: /s/ Edward M. McDonald Jr.
15 Edward M. McDonald Jr., Esq.,
16 Trial Attorney
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26 ⁴ The DOA Case docket indicates that Trustee Gupta has objected to eleven “trade debt claims”
27 in an omnibus claim objection filed on August 17, 2020, which was sustained by the Court on
28 October 5, 2020. [See DOA Case, ECF Nos. 119-120 and 168]. None of the “Trade debt
claims” were held by Desert Land. [See ECF Nos. 119 and 168]. In addition, Trustee Gupta
has filed objections to claims held by Citation Financial, Compass Investments Holding, LLC,
and Tivoli Motel, Inc. [See ECF Nos. 129, 132 and 135]. However, Trustee Gupta has not yet
filed an objection to the Desert Land claim. [See generally DOA Case docket].